2

APR 16 2010

No. 09-953

In the Supreme Court of the United States

TIM REISCH, ET AL., PETITIONERS

v

CHARLES E. SISNEY, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MICHAEL S RAAB
LOWELL V STURGILL JR
Attorneys
Department of Justice
Washington, D C 20530-0001
SupremeCtBriefs@usdoj gov
(202) 514-2217

QUESTION PRESENTED

Whether Congress acted within its authority under the Spending Clause of the Constitution, Art. I, § 8, Cl. 1, when it enacted the institutionalized persons provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	10

TABLE OF AUTHORITIES

Cases

Benning v *Georgia*, 391 F.3d 1299 (11th Cir 2004)	4, 9
Charles v *Verhagen*, 348 F.3d 601 (7th Cir. 2003)	4, 7, 9, 10
College Sav Bank v *Florida Prepaid Postsecondary Educ Expense Bd*, 527 U S 666 (1999)	5
Cutter v *Wilkinson*, 423 F.3d 579 (6th Cir. 2005)	4, 7
Fullilove v *Klutznick*, 448 U S 448 (1980)	4
Lau v. *Nichols*, 414 U.S. 563 (1974)	7, 9
Madison v. *Virginia*, 474 F 3d 118 (4th Cir 2006)	4, 7
Massachusetts v *United States*, 435 U.S. 444 (1978)	6
Mayweathers v. *Newland*, 314 F.3d 1062 (9th Cir 2002), cert. denied, 540 U S. 815 (2003)	4, 7, 9, 10
Pennhurst State Sch & Hosp v *Halderman*, 451 U S 1 (1981)	5
Printz v *United States*, 521 U S. 898 (1997)	5
Sabri v. *United States*, 541 U S. 600 (2004)	9
South Dakota v *Dole*, 483 U.S 203 (1987)	4, 5, 6, 10
Steward Mach Co v. *Davis*, 301 U S 548 (1937)	6
United States v *Butler*, 297 U S 1 (1936)	5

Constitution and statutes: Page

U S. Const.·
Art. I 5
§ 8, Cl 1 (Spending Clause) . . 3, 4, 5, 6, 7, 8
Amend. X 3
Amend XI 3
Age Discrimination Act of 1975, 42 U.S C. 6101 *et seq* 8
Civil Rights Act of 1964, Tit. VI, 42 U.S C 2000d *et seq* 7, 8
Education Amendments of 1972, Tit. IX, 20 U S C 1681 *et seq* 7
Rehabilitation Act of 1973 § 504, 29 U S C 794 8
Religious Land Use and Institutionalized Persons Act of 2000, 42 U S C. 2000cc *et seq* 2, 3
42 U S.C 2000cc-1 (§ 3) 2
42 U.S C. 2000cc-1(a)(1) 2
42 U S C. 2000cc-1(a)(2) 2
42 U S C 2000cc-1(b)(1) 10

In the Supreme Court of the United States

No. 09-953

TIM REISCH, ET AL., PETITIONERS

v.

CHARLES E. SISNEY, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1a-40a) is reported at 581 F.3d 639.[1] The opinion of the district court (Pet. App 41a-142a) is reported at 533 F. Supp 2d 952

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. On December 1, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 8, 2010, and the petition was filed on that date. Petitioner Charles Sisney filed a petition for a writ of certiorari in

[1] All references to "Pet App." are to the appendix to the petition for a writ of certiorari in No. 09-821

No. 09-821 on January 8, 2010. The conditional cross-petition for a writ of certiorari was filed on February 9, 2010 The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The underlying facts are fully set forth in the government's response to the petition for a writ of certiorari (09-821 Resp. 1-7) and will only be briefly restated here. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, applies in the institutionalization context and provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering" that interest. 42 U S.C. 2000cc-1(a)(1) and (2).

2. Petitioner in the underlying petition, Charles Sisney, is serving a life sentence in the South Dakota State Penitentiary and filed suit alleging, *inter alia*, that cross-petitioners violated his rights under RLUIPA in various respects. Pet. App 3a, 43a. The district court granted summary judgment to cross-petitioners on petitioner's individual-capacity damages claims under RLUIPA, *id.* at 58a-61a, and held that any recovery on his official-capacity damages claims would be limited to nominal damages, *id.* at 62a-78a. The court also granted summary judgment to cross-petitioners on all but three

of petitioner's official-capacity claims for injunctive relief under RLUIPA. *Id* at 82a-102a, 112a-136a. Finally, the court upheld the constitutionality of RLUIPA, rejecting cross-petitioners' contention that Congress exceeded its authority under the Spending Clause in enacting the statute and that the statute violates the Tenth Amendment of the Constitution and the separation of powers doctrine. *Id* at 102a-112a.

3. Petitioner filed an interlocutory appeal, and the court of appeals upheld the district court's conclusion that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. Pet. App. 3a, 14a-23a. The court of appeals held, however, that private suits for money damages under RLUIPA are barred by the Eleventh Amendment of the Constitution. *Id* at 23a-30a. The court of appeals further held that the district court erred in refusing to dismiss some, but not all, of petitioner's official-capacity claims for injunctive relief. *Id* at 33a-39a.

ARGUMENT

Cross-petitioners ask this Court to review the court of appeals' determination that Congress enacted the institutionalized persons provisions of RLUIPA, 42 U.S.C 2000cc *et seq* , pursuant to its authority under the Spending Clause. That determination does not merit further review because it is correct and because it does not conflict with any decision from this Court or from any other court of appeals.[2]

---

[2] The petition for a writ of certiorari in *Cardinal* v *Metrish*, No 09-109 (filed July 22, 2009), asks this Court to review the question whether an individual may sue a State or a state official in her official capacity for damages for a violation of RLUIPA At this Court's

1. To date, six courts of appeals, including the court of appeals in this case, have held that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. See *Madison* v. *Virginia*, 474 F.3d 118, 125 (4th Cir. 2006); *Cutter* v *Wilkinson*, 423 F.3d 579, 584-590 (6th Cir. 2005); *Benning* v *Georgia*, 391 F.3d 1299, 1305-1308 (11th Cir. 2004), *Charles* v. *Verhagen*, 348 F 3d 601, 606-610 (7th Cir. 2003), *Mayweathers* v. *Newland*, 314 F.3d 1062, 1066-1070 (9th Cir. 2002), cert denied, 540 U.S. 815 (2003); Pet. App. 14a-23a. No court of appeals has held otherwise, and cross-petitioners do not assert that the court of appeals' decision conflicts with that of any other circuit court. That alone is a sufficient reason for this Court to deny the cross-petition for a writ of certiorari.

2. Further review of the court of appeals' rejection of cross-petitioners' constitutional challenge to RLUIPA is also not warranted because the court of appeals was correct.

a. The Spending Clause authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Pursuant to that authority, and within specific limits, "Congress may attach conditions on the receipt of federal funds," *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citing *Fullilove* v. *Klutznick*, 448 U S. 448, 474

---

invitation, the United States filed a brief as amicus curiae in *Cardinal* urging that further review be granted on that question Because the same question is presented by the petition for a writ of certiorari filed in this case, the United States filed a brief urging this Court to hold the petition for a writ of certiorari in this case pending the Court's disposition of the petition in *Cardinal*

(1980) (plurality opinion) (Burger, C.J.)), thereby "fix-[ing] the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). This Court has held that the spending power is "not limited by the direct grants of legislative power found in the Constitution," but can be used to achieve broad policy objectives beyond Article I's "enumerated legislative fields." *Dole*, 483 U.S. at 207 (quoting *United States* v. *Butler*, 297 U.S. 1, 65-66 (1936)); see *Printz* v. *United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring) (contrasting impermissible command and condition on acceptance of federal funds). Thus, it is settled law that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

To be sure, Congress's authority under the Spending Clause is not unlimited. In *Dole*, this Court identified four limitations on Congress's use of that power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207 (quoting U.S. Const. Art. I, § 8, Cl. 1). Second, if Congress places conditions on the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (brackets in original) (quoting *Pennhurst*, 451 U.S. at 17). Third, this Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or pro-

grams.'" *Ibid.* (quoting *Massachusetts* v. *United States*, 435 U.S 444, 461 (1978) (plurality opinion)). And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id* at 208 [3]

b Cross-petitioners do not challenge the validity of RLUIPA under the second, third, or fourth prongs of the *Dole* inquiry. Rather, cross-petitioners argue (Cross-Pet. 8) only that RLUIPA "constitutes spending that is not for the 'general welfare'" (emphasis omitted). Cross-petitioners are incorrect. They argue (Cross-Pet. 18) that "Congress may only spend money for national, rather than local purposes" Of course, RLUIPA is not itself a spending statute; it places conditions on the receipt of all federal funds, but does not appropriate funds for any purpose. Even if cross-petitioners were correct that Congress may exercise its authority under the Spending Clause only for a purpose that is national in scope, the purpose of RLUIPA—to prohibit the use of any federal funds to subsidize discriminatory or unreasonable restrictions on institutionalized persons' religious exercise—is national in scope and benefits the general welfare. Indeed, all the courts of ap-

---

[3] The Court in *Dole* also observed that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" 483 U S at 211 (quoting *Steward Mach Co* v *Davis*, 301 U S 548, 590 (1937)) The Court did not, however, suggest that Congress lacks authority to place relevant conditions on the receipt of federal funds whenever the value of the federal offer is too tempting to decline To the contrary, the Court noted that every congressional spending statute "is in some measure a temptation," *id* at 211 (quoting *Steward Mach Co*, 301 U S at 589), and that "to hold that motive or temptation is equivalent to coercion [would be] to plunge the law in endless difficulties" *Ibid.* (quoting *Steward Mach Co*, 301 U S at 589-590) RLUIPA is not unconstitutionally coercive and cross-petitioners do not contend otherwise

peals to have addressed this issue have recognized that RLUIPA's institutionalized persons provisions are an uncontroversial invocation of Congress's spending power to "protect[] religious worship in institutions from substantial and illegitimate burdens." *Mayweathers*, 314 F.3d at 1066; see *Madison*, 474 F.3d at 125 ("[W]e have no trouble concluding that RLUIPA's 'attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare.'") (quoting *Charles*, 348 F.3d at 607); see also *Cutter*, 423 F.3d at 585.

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized that Congress validly exercised its authority under the Spending Clause when it enacted Title VI of the Civil Rights Act of 1964, 42 U.S.C 2000d *et seq.*, which prohibits discrimination on the basis of race by recipients of federal funds. The Court explained that Congress may use its authority under the Spending Clause to ensure that federal funds do not flow to governmental entities that engage in discrimination because such funding would tend to "encourage[], entrench[], subsidize[], or result[] in racial discrimination." *Lau*, 414 U.S. at 569 (citation omitted). Like the spending conditions at issue in *Lau*, RLUIPA's institutionalized persons provisions ensure that federal funds will not be used to subsidize state operations involving conduct that Congress has no wish to support, including discrimination against religion and the unjustified imposition of substantial burdens on an inmates' religious exercise. RLUIPA is one of many statutes enacted pursuant to the Spending Clause that is designed to ensure that recipients of federal funds do not engage in discriminatory behavior. See, *e g* , 20 U.S.C 1681 *et seq* (Title IX of

Education Amendments of 1972 prohibits discrimination on the basis of sex in all education programs receiving federal funds), 29 U.S.C 794 (Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by all recipients of federal funds); 42 U.S.C. 6101 *et seq.* (Age Discrimination Act of 1975 prohibits discrimination on the basis of age by recipients of federal funds).

Cross-petitioners argue (Cross-Pet. 19) that the conditions RLUIPA places on the receipt of federal funds cannot bind the State of South Dakota in this case because "RLUIPA is based on spending that is for a purely local rather than national purpose, and therefore exceeds Congress' power under the Spending Clause as originally understood." *Ibid.* Cross-petitioners make no attempt to identify the federal funds that South Dakota applied for and received, nor do cross-petitioners suggest that the receipt of such funds was in any way involuntary. Nevertheless, cross-petitioners assert (*id.* at 18) that any federal financial assistance that would be implicated in this case cannot have been spent for the general welfare because it was ultimately received by the State's correctional system and "[t]he funding of state prisons is inherently local spending because state prisons house those individuals who have committed crimes against the people of the State, as defined by the Legislature of the State."

By cross-petitioners' logic, virtually no Spending Clause legislation would be constitutional because such legislation almost always provides for funding at a local level, with conditions that ensure that federal money does not subsidize activity Congress considers detrimental to the general welfare. For example, the application of Title VI that this Court upheld in *Lau* involved fed-

eral spending that was received by public schools. 414 U.S. at 568. Although cross-petitioner contends (Cross-Pet. 7) that Congress may not use its spending power to pursue objectives related to education, this Court had no difficulty holding in *Lau* that Title VI is within Congress's spending clause power, noting that "[w]hatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citation omitted). Cross-petitioners have not offered any reason why a State's voluntary acceptance of federal funding for its prison system should be subject to a different rule. The fact that discriminatory conduct is effected through local entities does not diminish either its harm to the general welfare or Congress's legitimate interest in ensuring that federal funds do not subsidize such behavior [4] Indeed, "Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties, such as the free practice of one's religion," and "[t]he federal government also has a strong interest in monitoring the treatment of federal inmates housed in state prisons and in contributing to their rehabilitation." *Mayweathers*, 314 F.3d at 1067; see *Benning*, 391 F.3d at 1307, *Charles*, 348 F.3d at 608 RLUIPA's institutionalized persons provisions thus "follow[] in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and in-

---

[4] Because money is fungible, that distinct federal interest exists regardless of whether the funds directly finance the proscribed operations, or whether they make it possible by freeing up funds from other operations *Sabri* v *United States*, 541 U S 600, 605-606 (2004)

fringement on fundamental freedoms.'" *Charles*, 348 F.3d at 607 (quoting *Mayweathers*, 314 F.3d at 1067).[5]

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

APRIL 2010

---

[6] In addition, as the courts of appeals that have considered the question have unanimously held, RLUIPA satisfies the other elements of the *Dole* inquiry—and cross-petitioners do not argue otherwise. RLUIPA's institutionalized persons provisions unambiguously put recipients of federal grants on notice that those provisions apply to any "program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1). RLUIPA's conditions on the receipt of federal funds are directly related to the statute's purpose of preventing religious discrimination in institutions that accept those funds. And RLUIPA's institutionalized persons provisions do not "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210.